FILE COPY

Office - Supreme Court, U.
FILED
NOV 7 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,
Appellant,

vs.

MAX FACTOR & COMPANY AND SALES BUILDERS, INC.,
Appellees.

BRIEF FOR NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, AMICUS CURIAE.

HERBERT LEVY,
Attorney for National Association of Retail Druggists,
Amicus Curiae,
401 Union Trust Bldg.,
Baltimore, Md.

The Daily Record Co. Print, Baltimore.

INDEX.

PAGE

The Effect Of Price-Cutting Of Branded Commodities On The Independent Retail Druggist 3

Section 1½ Of The Act Is Not A Price Fixing Statute. It Does Not Restrain Competition. It Does Not Interfere With The Property Rights Or Personal Liberty Of The Defendant In This Case. It Merely Provides A Proper And Reasonable Remedy For Protecting The Plaintiffs And Those Who Have Contracted With Them Pursuant To Section 1 Of The Act From Wilful Interference With Their Contracts And In The Enjoyment Of The Benefits Therefrom 8

Conclusion 13

Appendix 16

TABLE OF AUTHORITIES CITED.

Cases:

Dr. Miles Medical Co. vs. John D. Park & Sons, 220 U. S. 373 8

Fairmont Creamery Company vs. Minnesota, 274 U. S. 1 9

Nebbia vs. New York, 291 U. S. 502 9

New State Ice Company vs. Liebmann, 285 U. S. 262 9

Ribnik vs. McBride, 277 U. S. 350 9

Tyson vs. Banton, 273 U. S. 418 9

U. S. vs. General Electric Co., 272 U. S. 476 11

Williams vs. Standard Oil Co., 278 U. S. 235 9

Statutes:

PAGE

California Statutes, 1931, c. 278 1

California Statutes, 1933, c. 260 2

Miscellaneous:

Census of American Business for 1933, Retail Distribution, Drug Retailing, Including Drug Store Chains, Issued by the United States Department of Commerce, Bureau of Census 4

Fifteenth Census of the United States (1930) Distribution, Volume I, Retail Distribution, Part I 4

"Restriction of Retail Price-Cutting With Emphasis on The Drug Industry" (March, 1936), Issued by the Division of Review of the National Recovery Administration 5

OPINION BELOW.

Max Factor & Company vs. Kunsman, 5 Cal. (2) 446, 55 Pac. (2) 177.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 79.

CLARENCE G. KUNSMAN,
Appellant,

vs.

MAX FACTOR & COMPANY AND SALES BUILDERS, INC.,
Appellees.

BRIEF FOR NATIONAL ASSOCIATION OF RETAIL DRUGGISTS, AMICUS CURIAE.

The National Association of Retail Druggists, on whose behalf this brief is filed, has a membership of more than 22,000 independent retail druggists.

It is a national organization, affiliated with state and county groups having an aggregate membership in excess of 50,000.*

The California Fair Trade Act of 1931 (*California Statutes*, 1931, c. 278), legalizing vertical resale price

---

* See Appendix.

maintenance contracts relating to branded commodities, and the 1933 amendment (*California Statutes,* 1933, c. 260), here challenged, whereby a remedy is given for the protection of such contracts from nullification by strangers, are undoubtedly of the utmost importance to producers of trade-marked and otherwise identified merchandise, as set forth in the appellees' brief. But this type of legislation also serves to preserve and maintain the integrity of the retail structure, and is of particular importance to the independent retail druggist.

Today, legislation identical with that now before this Court (or substantially similar thereto) is in effect in fourteen states*, having an aggregate population of more than one-half of the population of the whole country.

Because of the vital interest in this legislation of so many of its members, the National Association of Retail Druggists has applied for leave to file this brief as *amicus curiae* in support of its validity.

The legal arguments so ably presented in the briefs heretofore filed in support of the constitutionality of the Act will not be repeated. The discussion will be limited to a brief statement of: (a) the effect of price-cutting of branded commodities on the independent retail druggist; and (b) the propriety and reasonableness of the statutory method here in question of correcting the evils of such price-cutting.

---

* In addition to California: Oregon, Washington, Iowa, Wisconsin, Illinois, New York, New Jersey, Pennsylvania, Maryland, Virginia, Ohio, Louisiana and Rhode Island.

(a) THE EFFECT OF PRICE-CUTTING OF BRANDED COMMODITIES ON THE INDEPENDENT RETAIL DRUGGIST.

The druggist is more than a mere merchant. He renders an important medical service. In addition he has become the distributor of many products of which he is not the producer. The competition in his field of the chain drug store and other types of price-cutter has far-reaching social implications. It tends to eliminate the indispensible 24-hour neighborhood service of the pharmacist. It tends to over-emphasize the commercial side of his business at the expense of the essential professional service which he renders.

Unfortunately, the chain store and other types of price-cutters have been singularly successful in their competition with the small, neighborhood, one-store druggist. There are two reasons for this: First, the number of branded commodities distributed by the druggist has grown to unusual proportions; and secondly, the kind of branded commodity in which he deals is well adapted to price-cutting.

The Bureau of Foreign and Domestic Commerce authorizes the statement, based on its National Drug Store Survey conducted in St. Louis and vicinity in 1931, that the trade-marked and otherwise identified articles distributed through drug stores constitute 65% of sales, based on dollar volume, and based on item volume, would run much higher. The records and commodity classification cards upon which these percentages are based are on file in the Marketing Research Division of the Bureau of Foreign and Domestic Commerce.

Such commodities lend themselves to price-cutting, because they are well-known, inexpensive, relatively safe, and generally used.

As a result of the large number and peculiar adaptability to price-cutting of the branded commodities sold in drug stores, the practice has had a disastrous effect on the independent retail druggist.

The startling decline in the business of the independent retail druggist and the correlative increase in the business of the chains will appear from the following comparison of their total sales for the years 1929 and 1933, taken from the *Fifteenth Census of the United States* (1930), *Distribution, Volume I, Retail Distribution, Part I* (page 71, table 6) and the *Census of American Business for* 1933, *Retail Distribution, Drug Retailing, Including Drug Store Chains,* issued by the United States Department of Commerce, Bureau of the Census (pp. 4, 5 and 6):

NUMBER OF STORES.

Year	*Total No. of Stores*	*No. of Independents*	*% of Independents*	*No. of Chain Stores*	*% of Chain Stores*
1929	58,258	54,732	93.9	3526	6.1
1933	58,407	54,641	93.6	3766	6.4

SALES.

Year	*Total Sales*	*Average Sales Per Store*	*Average Sales of Independents*	*% Sales of Independents*	*Average Sales of Chain Stores*	*% Sales of Chain Stores*
1929	1,690,398,682	29,016	25,195	81.5	88,320	18.5
1933	1,066,252,000	18,256	14,622	74.9	70,976	25.1

The general decline in total sales was 37%, but the average decline in the independently owned stores was 42%, whereas, in the chain stores, it was only 14.2%.

It is significant also that while the total sales in chain stores declined 14.2% during this period, the percentage of total sales increased from 18.5% to 25.1%.

The depression may account for the decline in the total sales but there is a widespread belief that the difference in its relative effect must be attributed to the price-cutting of branded goods.

In the recently completed report entitled "*Restriction Of Retail Price-Cutting With Emphasis On The Drug Industry*" (March, 1936) issued by the Division of Review of the National Recovery Administration, the situation in the drug trade during the depression is described as follows (p. 233):

> "One misinterprets the quality of the demands for resale price control as far as retailers are concerned when the problem is approached merely as a depression phenomenon for its roots lie earlier and rest more deeply. However, the relative intensity and vigor of the demands and the type of economic theorizing which arose to rationalize these demands are intimately linked with the deep and lengthened business slump. The origins of the outcry for resale price maintenance in the drug trade are found in the conditions of the last quarter of the preceding century when branded proprietary drug products and large scale advertising intruded into the drug and chemical business in a large scale fashion, as well as in the normally intense nature of competition in the retail business. But it was the dominant price emphasis of the depression and the shift of consumers towards firms that actually or allegedly sold at cut rates that brought the issue to its legislative and trade focus."

The report from which the above quotation is taken covers the historical background of the movement to correct the evils of price-cutting and loss leader selling from its inception to the present time.

It reviews the legislative proposals and enactments and the results of the price-stabilization systems in operation. It contains significant evidence of the effect upon competition of compulsory vertical resale price maintenance of branded commodities. It shows that where such price maintenance prevails, the forces of the market compel the establishment of a reasonable price to the consumer. Producers whose products, in the absence of price maintenance, are sold at cut prices, find that where the resale prices are subsequently stabilized at a figure substantially in excess of the cut price, consumer resistance results and creates a shift in business to competing products. To offset this trend and maintain and increase their volume, they have no alternative but to reduce prices to the distributor so that the distributor's resale prices can in turn be reduced to meet the competition. The distributor's zeal for volume is no less than the producer's. He too is stimulated by the same consideration to advance the sale of lower priced competing goods. Thus competition among dealers is preserved by competition among rival producers. The net result of these forces of competition is that the dealer is compelled to establish a reasonable resale price and consumer prices of all commodities of the same class are reduced without loss to the distributor.

There is therefore a factual and logical basis for the claim made by the title of the Act in question that it pro-

tects "trade mark owners, distributors and the public," and the conclusion may rationally be drawn that these results are accomplished by intensifying competition among producers without eliminating it among distributors.

The report also deals particularly with the operation and effect of the California Fair Trade Act. And while the Act has been in operation too short a time to reveal its full effects, the report shows that there is substantial evidence that the Act accomplishes its objectives, that is to say, it protects the producers and distributors of branded commodities from the evil effects of price-cutting without raising the level of consumer prices.

In the light of the experience of the independent retail druggist, both with price-cutting and with vertical resale price maintenance as a corrective of the alleged evils of price-cutting, there would seem to be ample economic justification for the declaration of public policy expressed in Section 1 of the California Fair Trade Act.

The legislature of California has decided that price-cutting of branded commodities is a weapon which has been effectively used by the strong to crush the weak, thereby tending to monopoly; and that the legalization of vertical resale price maintenance contracts is an effective method of controlling this "injurious and uneconomic" practice.

There is dispute both as to the effect of the practice and the effectiveness of the remedy, but there is adequate authority and factual support for the legislative policy adopted.

There is no dispute, however, that where the proper choice of economic policy is controversial, it is the function of the legislature, not of the courts, to make the decision.

There is also no dispute that the legislature having found that price-cutting is an evil, the legislative purpose to correct the evil is legitimate and the power to accomplish it exists.

And finally, there is no dispute that the legalizing of vertical resale price maintenance contracts is legally and constitutionally unobjectionable.

It is objected, however, that the means selected by Section 1½ of the Act to protect such contracts from nullification by strangers have no real and substantial relation to the object sought to be attained and are unreasonable, arbitrary and capricious. The basis of the objection is that the Act is in effect a price-fixing statute and as such unnecessarily and unreasonably restrains competition.

(b) SECTION 1½ OF THE ACT IS NOT A PRICE-FIXING STATUTE. IT DOES NOT RESTRAIN COMPETITION. IT DOES NOT INTERFERE WITH THE PROPERTY RIGHTS OR PERSONAL LIBERTY OF THE DEFENDANT IN THIS CASE. IT MERELY PROVIDES A PROPER AND REASONABLE REMEDY FOR PROTECTING THE PLAINTIFFS AND THOSE WHO HAVE CONTRACTED WITH THEM PURSUANT TO SECTION 1 OF THE ACT FROM WILFUL INTERFERENCE WITH THEIR CONTRACTS AND IN THE ENJOYMENT OF THE BENEFITS THEREFROM.

The question in this case is not affected by the decision in *Dr. Miles Medical Co. vs. John D. Park & Sons,* 220 U. S. 373, because here the California legislature has ex-

pressly declared that resale price maintenance contracts relating to branded commodities are not in restraint of trade, but that, on the contrary, price-cutting where such contracts exist is an "injurious and uneconomic" practice. There, the court stated that the required specific declaration of legislative policy was lacking.

Nor is this case controlled by the decisions relating to statutory price-fixing, because no governmental price-fixing is involved.

Price-fixing statutes which this court has considered invariably have related to all in a particular industry or all of a particular commodity, for instance: milk (*Nebbia vs. New York,* 291 U. S. 502), or dairy products (*Fairmont Creamery Company vs. Minnesota,* 274 U. S. 1), or ice (*New State Ice Co. vs. Liebmann,* 285 U. S. 262), or gasoline (*Williams vs. Standard Oil Co.,* 278 U. S. 235), or selling theatre tickets (*Tyson vs. Banton,* 273 U. S. 418), or the business of employment agencies (*Ribnik vs. McBride,* 277 U. S. 350).

Under those statutes, once the price of gasoline or ice was fixed, all dealers in the commodity were inexorably bound. The commodity affected could not be sold except at the established price. The statute was compulsory in its operation. Competition was destroyed.

Under the statute here in question: (1) if no resale price contract is entered into, the statute is inapplicable; (2) competition among distributors is not eliminated because if branded articles are made subject to resale price maintenance contract, the dealer is free to handle competitive unbranded articles or competitive branded arti-

cles not subject to price restriction; (3) competition between producers is in no way lessened; and (4) the price to the consumer is determined by the forces of the market. The Act merely gives the producer some measure of control of his retail outlets. He is not relieved of the competitive threat of rival producers and of competition with unbranded goods.

In other words, if Max Factor lipstick is subject to resale price maintenance contract, and the dealer is unwilling to abide by the price restriction, he has the alternative of dealing in any other brand of lipstick, either not subject to price restriction or subject to price restriction satisfactory to him, or he can deal in unbranded lipstick, or lipstick under his own trade mark or trade name and sell it at whatever price he may please. Or, by express provision of the statute, if he decides at any time to discontinue dealing in goods subject to the price restriction, he can close them out at any price. And he has the same privilege if he is first apprised of the price restriction after he acquires the goods.

Moreover, there is nothing in the Act which prevents a dealer from selling a commodity which is subject to price restriction at any price he chooses, provided he detaches, removes or obliterates the trade mark, brand or name of the producer. His liberty to deal with the physical property is, therefore, entirely unaffected.

No similar alternatives were afforded the dealer under the laws regulating the price of ice or dairy products or the other commodities in the cases above cited. If he elected to deal in any kind or quality of the regulated commodity, he had to conform to the requirement of the

law. He was required either to abide by the established price or to discontinue to deal. And if he failed to abide, he was subject to drastic penalties.

It is not disputed that the owner of the trade mark or trade name can lawfully refuse to sell his goods unless the purchaser maintains the resale price which he establishes, and, under Section 1 of the California Act, can also lawfully require his contracting dealers to agree not to sell to any one who will not conform to the stipulated price.

He has the legal right thus to prevent those who will not conform from acquiring his goods for resale.

One who, with knowledge of the price restriction, purchases the goods for resale without restriction as to price, thereby insists that the Fourteenth Amendment gives him the right to acquire indirectly that which the law denies him the right to acquire directly, namely, the right to traffic in the good will of the owner of the trade mark to the damage of such owner and those with whom he has lawfully contracted.

The statute does not restrict free competition any more than the agency system of resale price maintenance approved by this court in *U. S. vs. General Electric Co.*, 272 U. S. 476. It merely gives a right of action for damages resulting from the unauthorized use of the good will associated with trade marks and trade names, when the unauthorized user knows of his lack of authority and nevertheless deliberately persists in the unauthorized use.

The non-contracting party's right to deal in competitive commodities of the same class is not affected, and at the same time, the property rights of the owner of the good will associated with a trade mark or trade name are also preserved. And the property rights of the dealers who have acquired the right to use that good will by agreeing with the owner to maintain the resale price are likewise protected.

Whether the price-cutting involved may be characterized as predatory or merely in violation of the contractual restriction imposed by the owner of the good will, those who wilfully and knowingly indulge in it are guilty of a deliberate trespass upon the rights and property of the owner of the good will and the distributive outlets with whom he has lawfully contracted. A trespasser should not be heard to invoke the protective sanctions of the Constitution to aid him in his trespass. He is not deprived of any liberty or property entitled to protection under the Constitution.

There may be circumstances under which the application of the statute here in question may be inequitable. But they do not exist in this case. Here is a typical state of facts to which the statute was intended to and does apply. And this application is neither arbitrary nor unreasonable. On the contrary, as applied to the facts of this case, the statute serves a legitimate legislative purpose, which the legislature has the power to accomplish and the means selected have a real and substantial relation to the object sought to be attained and are entirely reasonable and appropriate for that purpose.

CONCLUSION.

There is nothing in the Federal or California Constitutions or in any of the cases cited by the appellant that says that competition among distributors of Max Factor's lipstick must be free and unrestrained. On the contrary, with or without specific legislative authority, Max Factor has a perfect right to establish a resale price for his product and eliminate competition in Max Factor's lipstick among his distributors either by adopting the agency system of distribution or by refusing to sell those who will not maintain his price. Why, then, is the legislature of the State of California powerless to give him an effective method of protecting this unquestioned right?

In all of the cases cited by the appellant in which the abridgement of the right of free competition has been alleged to be in violation of due process, there was an attempt to restrict all competition in a particular commodity or business. If the legislature of California attempted to regulate the price of all lipsticks or of all cosmetics, those cases would be applicable, because there would then be involved a general restraint of competition which must meet the requirements of due process.

It must be admitted:

(a) That the legislature of California has the power to legalize resale price maintenance contracts relating to branded commodities;

(b) That a corollary of the right to make such contracts is the right to refuse to sell unless the purchaser agrees to maintain the stipulated price;

(c) That sales by non-contracting parties at less than the contract price have a tendency to induce breaches of the contracts establishing the price;

(d) That sales by non-contracting parties at less than the contract price destroy the value of the contracts establishing the prices both to the contracting producers and distributors;

(e) That the California Act does not preclude non-contracting parties from competing with other branded or unbranded articles of the same general class;

(f) That the forces of the market, that is to say, the rivalry of competing producers and distributors, will make for the establishing of reasonable resale prices;

(g) That there is a widespread opinion, supported by evidence of a substantial character, that price-cutting of branded commodities tends to destroy the good will associated with the trade mark or trade name affixed to the goods, and also tends to foster monopoly; and

(h) That there is substantial evidence that compulsory price maintenance of branded commodities tends to reduce the level of prices of such articles to the consumer.

Once these admissions are made, as they must be, it follows that the deliberate violation by a non-contracting party of a contractual resale price restriction upon branded goods, when he is free to deal in similar competing goods without restriction or to discontinue to deal in, or to detach, remove or obliterate the trade mark, brand or name from, the restricted goods, and sell them

at any price he pleases, is nothing more than a malicious exploitation for his own benefit, and without regard to the rights of others, of the good will associated with the trade mark or trade name affixed to the restricted goods.

It is respectfully submitted that such exploitation is not the free competition which the Constitution is intended to safeguard. It is an unfair trade practice against which the legislature of California has full power to prescribe a civil remedy to protect those who may be damaged thereby.

Circumscribed as the statute is, the property rights and personal liberty of the defendant are fully preserved, and at the same time protection is afforded to the property rights of the plaintiffs and those with whom they have contracted.

The judgment of the Supreme Court of California should be affirmed.

Respectfully submitted,

HERBERT LEVY,

Attorney for National Association of Retail Druggists,
Amicus Curiae,
401 Union Trust Bldg.,
Baltimore, Md.

APPENDIX.

The views expressed in the aforegoing brief are subscribed to and concurred in by the following associations:

Name of Association	*No. of Members*
Alabama Pharmaceutical Association	500
Allegheny Co. Retail Druggists Association	437
Arizona Pharmaceutical Association	400
Arkansas Pharmaceutical Association	679
Baltimore Retail Druggists Association	350
Boston Association of Retail Druggists, Inc.	510
California Pharmaceutical Association	3035
Chicago Retail Druggists' Association	1200
Colorado Pharmaceutical Association	900
Delaware Pharmaceutical Society	70
D. C. Pharmaceutical Association	145
Florida Pharmaceutical Association	582
Georgia Pharmaceutical Association	886
Idaho Pharmaceutical Association	196
Indiana Pharmaceutical Association	3607
Indianapolis Association of Retail Druggists	300
Iowa Pharmaceutical Association	4000
Kansas Pharmaceutical Association	1124
Maine Pharmaceutical Association	340
Maryland Pharmaceutical Association	450

Name of Association	*No. of Members*
Massachusetts State Pharmaceutical Association	1400
Minnesota State Pharmaceutical Association	1100
Mississippi State Pharmaceutical Association	600
Montana State Board of Pharmacy	350
New Hampshire Pharmaceutical Association	400
N. Y. County Pharmaceutical Society	154
N. Y. State Pharmaceutical Association	6840
North Carolina Pharmaceutical Association	985
North Dakota Pharmaceutical Association	601
Ohio State Pharmaceutical Association	982
Oregon State Pharmaceutical Association	400
Philadelphia Association of Retail Druggists	1600
Retail Druggists' Association of St. Louis	541
Rhode Island Pharmaceutical Association	397
South Carolina Pharmaceutical Association	640
South Dakota State Pharmaceutical Association	650
Tennessee Pharmaceutical Association	2250
Virginia Pharmaceutical Association	375
W. Va. State Pharmaceutical Association	400
Wisconsin Phrmaceutical Association	1011
Wyoming Pharmaceutical Association	196
Total	41583

SUPREME COURT OF THE UNITED STATES.

Nos. 55, 79.—October Term, 1936.

The Pep Boys, Manny, Moe & Jack of California, Appellants,		
55	*vs.*	
Pyroil Sales Company, Inc.		Appeals from the Supreme Court of the State of California.
Clarence G. Kunsman, Appellant,		
79	*vs.*	
Max Factor & Co., and Sales Builders, Inc.		

[December 7, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

These appeals involve the question of the constitutionality of §§ 1 and 1½ of the California Fair Trade Act, as amended, Cal. Stat. 1931, p. 583, Cal. Stat. 1933, p. 793; Deering's Gen. Laws of California, 1931, vol. 3, Act 8782, printed in the margin.* It will be

*Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade-mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of California by reason of any of the following provisions which may be contained in such contract:

1. That the buyer will not resell such commodity except at the price stipulated by the vendor.

2. That the vendee or producer require in delivery to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

1. In closing out the owners' stock for the purpose of discontinuing delivering any such commodity.

2. When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

3. By any officer acting under the orders of any court.

Sec. 1½. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section 1 of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

seen upon comparison that they are substantially identical with §§ 1 and 2 of the Illinois act, which we have just sustained in *Old Dearborn Distributing Company* v. *Seagram-Distillers Corporation, ante* p.—.

In the present cases suits were brought by appellees against appellants to enjoin the latter from alleged violations of § 1½. The sufficiency of the complaints was challenged by demurrer, the facts alleged being, therefore, admitted. The trial courts, upon these facts, held the section invalid, and appeals were taken to the state supreme court. In that court, No. 79 was first heard; the view of the trial courts was rejected; and the section held to be constitutionally valid. 5 Cal. (2d) 446. Upon the authority of that decision, No. 55 was also reversed. 5 Cal. (2d) 784. The decrees of the trial courts entered on the orders sustaining demurrers without leave to amend were reversed; and respondents (appellants here), having elected to stand on their demurrers, the trial courts were ordered to enter judgment in favor of appellants (appellees here), as prayed for in their complaints.

The questions presented and the facts involved are substantially the same as those which were present in the two suits involved in the *Old Dearborn Distributing Company* case; and upon that authority, the decrees entered in the court below are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.